IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 20927-0-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
OCTAVIO GONZALES FLORES,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

KATO, J.—Octavio Gonzales Flores was convicted of six counts of delivery of a controlled substance, two counts of involving a minor in a drug transaction, and possession with intent to deliver. The court imposed an exceptional sentence. He claims the evidence did not support his convictions for involving a minor in a drug transaction; the court improperly admitted certain evidence, and erred by imposing an exceptional sentence. We affirm.

In 2001, the North Central Washington Narcotics Task Force conducted an investigation of the Flores family. During July, August, and September, the task force used a confidential informant (CI) to make several controlled buys of cocaine.

The CI purchased various amounts of drugs on July 26, July 31, August 3, August 14, August 24, and September 25, 2001, from Mr. Flores. Mr. Flores spoke Spanish and the CI spoke English, so Mr. Flores's wife, Sandra, interpreted for the pair. With the exception of the July 26 controlled buy, the CI wore a wire to record the audio of the transactions. The task force conducted an aerial surveillance of the September 25 buy.

The CI also conducted controlled buys on August 10 and August 21, 2001. Although Mr. Flores was not present at either transaction, his wife and his brother, Arnulfo, were there.

On August 10, the CI identified Mr. Flores and Ms. Flores in separate photo montages.

On September 25, the task force executed a search warrant on Mr. Flores's residence and arrested Ms. Flores. She spoke to the police and told them about the drug operations that she, Mr. Flores, and Arnulfo had conducted. She admitted her daughter was present during some of the transactions. The police later arrested Mr. Flores. A search incident to arrest revealed cocaine and some recorded money the task force had given the CI earlier that day.

The State charged Mr. Flores with six counts of unlawful delivery of a

controlled substance, two counts of involving a minor in a drug transaction, and unlawful possession of a controlled substance with intent to deliver.

Mr. Flores testified at trial and admitted to one count of delivery of a controlled substance and the unlawful possession count. The jury convicted on all charges. The court imposed an exceptional sentence. This appeal follows.

Mr. Flores contests his convictions for involving a minor in a drug transaction. The CI purchased cocaine from Mr. Flores on July 26 and July 31 at the Flores residence. On July 26, the CI contacted Ms. Flores, who was sitting with her daughter outside the residence. She translated his request for drugs to Mr. Flores in front of the child. On July 31, the CI contacted Ms. Flores inside her residence. Mr. and Ms. Flores talked to the child during this transaction. There was no effort to hide either transaction from her.

At the close of the State's case in chief, Mr. Flores moved to dismiss the two counts of involving a minor in a drug transaction. The court denied the motion.

Former RCW 69.50.401(f) (2001) makes it unlawful to "compensate, threaten, solicit, or in any other manner involve a person under the age of eighteen years in a transaction unlawfully to manufacture, sell or deliver a

controlled substance."

Mr. Flores argues the term "involve" requires some sort of participation by the minor. Division One of this court has rejected this argument:

> The involving a minor in a drug transaction statute does not require that the minor actually participate in the drug transaction. In fact, the minor's culpability and actions—which are proscribed under other statutes—are inapposite for the purposes of the involving a minor in a drug transaction statute. Instead, the focus is on the defendant's affirmative acts. A defendant violates RCW 69.50.401(f) if he or she compensates, threatens, solicits or in any other manner involves—i.e., surrounds, encloses, or draws in—a minor in an unlawful drug transaction, or obliges a minor to become associated with the drug transaction, e.g., by inviting or bringing a minor to a drug transaction, or allowing the minor to remain during a drug transaction.

State v. Hollis, 93 Wn. App. 804, 812, 970 P.2d 813, *review denied*, 137 Wn.2d 1038 (1999). Mr. Flores urges this court to reject *Hollis*, arguing the statute should require the minor act in some way in order for him to be culpable. But the statute has no such requirement. It criminalizes the adult's actions, not the minor's. By allowing a minor to be present during a drug transaction, an adult violates the statute.

Mr. Flores asserts *Hollis* erroneously criminalized mere presence. He cites cases involving accomplice liability to argue that mere presence, or even presence coupled with knowledge, is insufficient for accomplice liability. Mr. Flores, however, was charged with

involving a minor in a drug transaction. The child's presence at the transactions involved her in them. Her actions need not rise to the level of an accomplice to satisfy former RCW 69.50.401(f). Mr. Flores's argument fails.

He further contends the evidence was insufficient to support his convictions of involving a minor in a drug transaction. When a defendant challenges the sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). We draw all reasonable inferences in the State's favor and interpret them most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977).

The evidence showed that during two of the controlled buys, Ms. Flores's daughter was present. This is sufficient to support the convictions.

Mr. Flores next contests the admission of Ms. Flores's statements at trial. When the police arrested Ms. Flores, she told them about the transaction on September 25 and the drug operations she and Mr. Flores had conducted. She acknowledged her daughter was present during some of the transactions.

The court also admitted statements Ms. Flores made at a forfeiture

hearing. She said she and Mr. Flores sold cocaine and lived primarily off the proceeds from the sales. Mr. Flores claims the admission of Ms. Flores's statements was error.

Mr. Flores claims these statements were admitted under ER 801(d) as statements made by a co-conspirator. Review of the record, however, establishes the statements were admitted under ER 804(b)(3).

A statement by an unavailable declarant may be admitted if it is against her interest. ER 804(b)(3). Under this rule, a hearsay statement against one's interest is admissible "'because it is presumed that one will not make a statement damaging to one's self unless it is true.'" *State v. Roberts*, 142 Wn.2d 471, 495, 14 P.3d 713 (2000) (quoting 5 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 804.06[1] (1997 & Supp. 1999)). But this type of statement is not regarded as a firmly rooted exception to the hearsay rule. *State v. Whelchel*, 115 Wn.2d 708, 715, 801 P.2d 948 (1990). Accordingly, such evidence must be excluded absent a showing of particular guaranties of trustworthiness. *Id.*

There are three requirements that must be met in order for a court to properly allow a hearsay statement into evidence pursuant to ER 804(b)(3):

(1) the declarant is unavailable; (2) the declarant's statement tends to expose the declarant to criminal liability so that a reasonable person in the same position would not have made the statement unless convinced of its truth; and (3) corroborating circumstances clearly indicate the statement is trustworthy. *Whelchel*, 115 Wn.2d at 715-16.

In general, our courts apply the nine *Ryan*[1] factors to determine the reliability of hearsay statements. It is not necessary that all the *Ryan* factors be present. Rather, the court must be satisfied after weighing the various factors that the balance weighs in favor of reliability. *State v. Hutcheson*, 62 Wn. App. 282, 292-93, 813 P.2d 1283 (1991), *review denied*, 118 Wn.2d 1020 (1992). Here, the court properly determined Ms. Flores was unavailable because Mr. Flores had asserted the marital privilege. ER 804(a)(1). Her statements exposed

[1] *Ryan* discussed various factors to be used in evaluating the reliability of out-of-court declarations. These include: (1) whether the declarant had an apparent motive to lie; (2) whether the general character of the declarant suggests trustworthiness; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) whether the timing of the statements and the relationship between the declarant and the witness suggest trustworthiness; (6) whether the statements contained express assertions of past fact; (7) whether cross-examination could not help to show the declarant's lack of knowledge; (8) whether the possibility of the declarant's recollection being faulty is remote; and (9) whether the circumstances surrounding the statements give no reason to suppose that the declarant misrepresented the defendant's involvement. *State v. Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984).

her to criminal liability. The court also considered the *Ryan* factors, which demonstrated the statements were trustworthy. The court did not err by admitting the evidence under ER 804(b)(3).

Mr. Flores further argues the admission of Ms. Flores's statements violated his confrontation rights as set forth in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). *Crawford* held "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68-69. The Court noted the Sixth Amendment applies to those who "bear testimony," and testimony "is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* at 51.

There are three "formulations of [the] core class" of testimonial statements. *Id*. These include "*ex parte* in-court testimony or its functional equivalent," "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," and "statements that

were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 51-52 (citations omitted).

The statements made by Ms. Flores to the police and at the forfeiture hearing were testimonial. Under *Crawford*, the right confrontation is therefore implicated for their admission. There was no confrontation of Ms. Flores and the statements were thus inadmissible.

But this error is subject to a harmless error analysis. *State v. Davis*, 154 Wn.2d 291, 304, 111 P.3d 844 (2005), *aff'd sub nom. Davis v. Washington*, ___ U.S. ___, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). An error is harmless beyond a reasonable doubt if untainted evidence admitted at trial is so overwhelming that it necessarily leads to a finding of guilt. *State v. Thompson*, 151 Wn.2d 793, 808, 92 P.3d 228 (2004). The CI identified Mr. Flores. There was police surveillance implicating him. When he was arrested, Mr. Flores had money recorded by the police and given to the CI to buy drugs. The untainted evidence was so overwhelming that the admission of Ms. Flores's statements was harmless error.

Mr. Flores next claims the court erred in several of its evidentiary rulings.

He claims the court should not have admitted (1) evidence of two drug transactions that involved his brother and his wife; (2) testimony that drug dealers do not typically keep drugs at their residences; (3) testimony from the CI about a statement made by Mr. Flores; and (4) the audio tapes and the transcripts of these tapes. He did not object, however, to any of this testimony at trial. Therefore, he has waived any claim the evidence was admitted in error. ER 103(a)(1); RAP 2.5(a); *State v. O'Neill*, 91 Wn. App. 978, 993, 967 P.2d 985 (1998).

Mr. Flores objects to the imposition of an exceptional sentence. He was convicted of nine offenses and had an offender score of 18 for each offense. The delivery (six counts) and possession (one count) convictions had standard ranges of 108-120 months, while the involving a minor in a drug transaction (two counts) convictions had ranges of 60 months.

The court imposed 120 months on five of the delivery counts and 60 months for the two counts of involving a minor in a drug transaction convictions, one of the delivery counts, and the possession count. The court ordered the possession conviction and one of the convictions for delivery, each with a 60 month term, to run consecutive to the other counts, but concurrent with each

other. This resulted in an exceptional sentence of 180 months. The court listed several reasons for imposing an exceptional sentence. It found, pursuant to former RCW 9.94A.535(2)(e)(i) (2004), the current offenses were major offenses of the Uniform Controlled Substances Act because it involved more than three sales. The court also found the amounts involved were substantially greater than amounts for personal use, and Mr. Flores was a in a high position of the drug distribution hierarchy. It also found the crimes involved a high degree of sophistication. Finally, the court found the multiple offense policy resulted in a sentence that was clearly too lenient. Mr. Flores claims error.[2]

In *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the U.S. Supreme Court held a defendant had a constitutional right to have a jury determine whether the factors permitting an exceptional sentence had been proven beyond a reasonable doubt. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a

[2] Mr. Flores's opening brief claims the court erred by imposing an exceptional sentence for his convictions of involving a minor in a drug transaction. But review of the record clearly shows the court did not impose the exceptional sentence for these offenses. He also argues that because the convictions involving the minor should be reversed, the sentence is no longer warranted. Those convictions, however, were proper.

reasonable doubt." *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The statutory maximum for purposes of *Apprendi* analysis "is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely,* 542 U.S. at 303.

The State concedes all the factors need to be found by a jury. But it claims that the finding of a major violation of the Uniform Controlled Substances Act was indeed made by the jury, so the exceptional sentence should be upheld.

When the reviewing court overturns one or more aggravating factors but is convinced the trial court would have imposed the same sentence based upon the factor that is upheld, the court may affirm the sentence. *State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003). The issue is whether imposition of the exceptional sentence based on a major violation of the Uniform Controlled Substances Act can withstand a *Blakely* challenge.

Former RCW 9.94A.535(2)(e)(i) permitted the imposition of an exceptional sentence if the current offense was a major violation of the Uniform Controlled Substances Act. If the current offense involved at least three separate transactions in which controlled substances were sold, a major violation existed.

Former RCW 9.94A.535(2)(e)(i). The content of the statute has not changed. Now, however, it has been recodified at RCW 9.94A.535(3)(e)(i). RCW 9.94A.535(3) now sets forth aggravating factors that must be considered by a jury and imposed by the court. This change reflects the legislature's intent to comply with *Blakely*.

Mr. Flores was involved in at least three separate transactions in which controlled substances were sold. Since the findings of guilt by the jury on those counts give the court the basis to impose the exceptional sentence, the State argues the jury made the requisite factual findings in accord with *Blakely*.

Mr. Flores counters the State was able to ensure an exceptional sentence by conducting multiple buys. But the statute permits an exceptional sentence if the current offense involves three or more sales of drugs. Mr. Flores has not challenged the content of the statute. The State's argument is persuasive.

Because the facts supporting the exceptional sentence were found by a jury, there was compliance with *Blakely*. Moreover, the record indicates the court would have imposed the same exceptional sentence based only on this factor.

Affirmed.

A majority of the panel has determined this opinion will not be printed in

the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kato, J.

WE CONCUR:

Sweeney, C.J.

Kulik, J.